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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD J. FLEMING,

Petitioner,

vs.

SHUKI Y. LEVY,
DEBORAH DALE LEVY, and
CHARLES UNDERWOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

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QUESTIONS PRESENTED

Does the Due Process Clause of the Fourteenth Amendment require that an individual be afforded notice and an opportunity to be heard — consistent with mandatory state statutory authority — when an appellate court decides issues never raised on appeal or briefed by the parties?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

The petitioner Edward J. Fleming respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, rendered on September 13, 1988, following denial of his petition for review and mandate by the California Supreme Court on November 30, 1988. This case presents an important question of law under the Fourteenth Amendment to the United States Constitution concerning the due process right to notice and opportunity to be heard, arising in the context of an appellate proceeding

wherein the California Court of Appeal reached issues neither briefed or argued by the parties and thereby extinguished property rights vested in petitioner by a previous, final trial court order, and the appellate court thereafter refused to grant petitioner mandatory rehearing as required by state statute to address the questions raised by its decision.

PARTIES TO THE PROCEEDING

Petitioner is Edward J. Fleming, cross-defendant before the Superior Court for the State of California in and for Los Angeles County and appellant/petitioner in the California Court of Appeal. Respondents are Shuki Y. Levy and Deborah Dale Levy, variously interveners and respondents in the superior court and appellate court below. Other parties affected herein are Thomas R. Morgan, plaintiff, cross-defendant and appellant, and Charles Underwood, defendant, cross-complainant and respondent, in the various trial and appellate court proceedings below.

OPINION BELOW

The opinion of the Court of Appeal for the State of California, Second Appellate District, Division Five, is unreported and is reproduced (along with the court's order denying petitions for rehearing) as Appendix A to this petition. The orders of the California Supreme Court denying review and denying Fleming's petition for writ of mandate are also unreported and are attached as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal was filed on September 13, 1988. Petition for rehearing was denied by the Court of Appeal on October 12, 1988. The order of the California Supreme Court denying review was filed on November 30, 1988. Petition for writ of mandate was also denied by the California Supreme Court on the same day. Under California law, the judgment of the Court of Appeal became final upon the Supreme Court's denial of review. Cal. Rules of Court, R. 24, 25, 28. This petition is timely filed within 90 days of November 30, 1988. The jurisdiction of this court is invoked pursuant to Title 28, United State Code section 1257, subdivision (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, section 1, provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Government Code section 68081 provides:

> "Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a summary denial of a

petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

"This section shall remain in effect only until January 1, 1990, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1990, deletes or extends that date."

STATEMENT OF THE CASE

This case has an ancient and complicated history. Some 25 years ago Thomas Morgan brought suit against Charles Underwood for specific performance of an oral partnership agreement. Underwood cross-complained against Morgan and Edward J. Fleming, petitioner herein. On March 1, 1971, default judgment was entered against Fleming and in favor of Underwood. Underwood was awarded $13,000 in principal, interest and costs. Underwood obtained a writ of execution on the judgment, and thereafter the Sheriff conducted a sale of Fleming's residence at 2600 Zorada Drive to satisfy the judgment. Underwood was the high bidder and purchased the Fleming property. A - 2-3.

Apparently the property changed hands several times thereafter. The Levys purchased the residence on May 23, 1978 for $210,000. A-3.

On June 4, 1985, petitioner brought a motion to: (1) set aside and vacate as void the default and default judgment; (2) cancel and vacate writ of execution; (3) cancel and vacate abstract of judgment; (4) vacate and set aside sheriff's execution sale; (5) cancel sheriff's deed; and (6) dismiss cross-complaint against cross-defendant Edward J. Fleming. CT 1-35. Petitioner asserted numerous reasons why the default judgment Underwood obtained against Fleming was void. *Ibid.*

Underwood was finally served with notice and a copy of the motion on September 17, 1985. CT 134-136. Underwood, however, made no appearance. A-3. On October 9, 1985, after an unreported hearing before the Honorable Ronald M. George, Judge of the Los Angeles Superior Court, the matter was submitted. On October 16, 1985, the court ruled as follows:

> "The motion is granted in all respects without opposition, the file now having been found and it appearing that the judgment is void because of (1) improper service of the second amended complaint; (2) judgment exceeded the prayer; (3) Hassrick and Fleming's declarations establish personal service was never made on Fleming; and (4) Default was untimely entered — C.C.P. Sections 473, 581(b), and 583(b)." CT 139.

On December 6, 1985, Judge George signed an order, drafted by petitioner's counsel, which vacated the 1971 default judgment in favor of Underwood and restored petitioner to possession of his former residence. CT 143-153.

On or about April 7, 1986, a uniformed Los Angeles County Marshal posted a notice to vacate and writ of

possession at the Zorada Drive home. The notice required that the premises be vacated by April 12. On or about April 14 the property went into escrow in anticipation of its sale from the Levys to third parties. The Levys returned from vacation on April 17 and found themselves locked out of the Zorada property. Petitioner moved into the residence. A - 6-7.

On April 23, 1986, the Levys filed an ex-parte application as "specially appearing third parties" "for [an] order correcting order of December 6, 1985, entered as a result of clerical error or inadvertence." CT 185-202. The Levys also filed an ex parte application for orders (1) recalling writ of possession of real property; (2) quashing levy of writ of possession of real property; (3) staying execution on order for possession of real property; (4) seeking temporary restraining order. CT 203-216. The Levys' applications were opposed by petitioner on the basis that they were not parties to the action and thus had no standing, and further that paragraph 13 of the December 6, 1985 order enjoined the Levys from asserting an adverse claim. CT 217-239.

A hearing was held in the Superior Court of the State of California for the County of Los Angeles on April 23, 1986, the Honorable John L. Cole, Judge presiding. I-RT 1. Petitioner's counsel acknowledged that the Levys had not been given notice of the 1985 motion to set aside the 1971 default judgment. However, petitioner asserted that the Levys were informed at the time they purchased the residence in 1978 of Fleming's claim to the property. I-RT 9-10. Judge Cole issued a temporary restraining order and

issued an order to show cause re preliminary injunction. I-RT 11; CT 240-247.

On April 30, 1986, the Levys filed a "Complaint in intervention for: 1) Declaratory Relief, 2) Injunction." CT 291-304. The Levys' complaint in intervention was opposed by petitioner. CT 328-343.

On May 19, 1986, petitioner filed his opposition to the Levys' order to show cause for a preliminary injunction, ex parte application for order correcting order of December 6, 1985, and ex parte application to recall writ, quash writ, stay execution on order, and temporary restraining order. CT 354-381. Petitioner also filed a separate motion to strike the Levys' complaint in intervention. CT 382-409. The Levys filed their responsive pleadings, CT 413-437, and petitioner replied. CT 438-456.

Petitioner maintained in his pleadings that notice was not required because the Levys were not parties to the action and were chargeable with notice of the invalid judgment. CT 362. Petitioner also urged that the Levys were not bona fide purchasers and he was not required to give them notice before dispossessing them. CT 363-369. The Levys' pleadings rejoined that the court should correct "clerical" errors in the order of December 6, 1985 because the court was misled into believing that no third parties were involved in the action. CT 418-423. The Levys also claimed that they were bona fide purchasers. CT 423-431. Finally, the Levys maintained that the court was without jurisdiction to quiet title or award petitioner possession of the property as against innocent third parties without notice of the action. CT 432-435.

On May 23, 1986, the matter came on for hearing before the Honorable Ronald M. George, the initial trial judge. II-RT 1. The court first inquired why petitioner waited 11 years before seeking to set aside the 1971 judgment. Mr. Friedlander (Fleming's then counsel) explained that petitioner told him that he was sick, adding that someone else told counsel that petitioner had cancer. II-RT 9-10. Judge George then asked,

> ". . . why, in the lengthy recitations involved in the motion initially noticed for June 4, 1985, and ultimately heard on October 9, 1985, the motion totaling 31 pages with some detailed history, and various proceedings, why is there a dearth of post-1974 history, in particular with regard to good faith purchasers.
>
> "Why was nothing disclosed to the Court with regard to the present status of the title and occupancy?" II-RT 12.

Mr. Friedlander replied: "At the point in time when I prepared the motion I was not concerned with nor aware of subsequent transfers." *Ibid.*

Judge George thereupon confronted Friedlander with his own admission that he knew of subsequent transfers prior to the October 9, 1985 hearing. Counsel was asked whether or not he believed that was a material change warranting disclosure to the court. II-RT 13. Friedlander explained that he researched the effect of Fleming's subsequent transfers, "[a]nd the research I did reflected that anybody who holds title through a title that was defeasible such as would stand in the same shoes in terms of they would not have

title." II-RT 14. He denied that he intentionally withheld such information from the court. *Ibid.*

Moving on to what the court called the "merits of the underlying matter", II-RT 15, petitioner's counsel argued that a title search would have put subsequent purchasers on notice that the 1971 judgment was void. He argued that the Levys' remedies lay in suing those in their chain of title and/or the title insurance company. II-RT 15-19. When asked whether there was any evidence showing that the Levys had notice of a defect in their chain of title, counsel stated that he did not know "because this is in a summary proceeding." II-RT 19.

> "On the face of the record, unless the Court postpones the matter to allow depositions to be taken of the Levys to find out what, if anything, they knew from the broker or title insurance company, there is nothing in the record that would reflect to the Court that they had any kind of notice, actual notice." II-RT 20.

Finally, the court asked petitioner's counsel why — given the fact that petitioner sat on his rights for many years — "it is not more equitable to have Mr. Fleming relegated to a lawsuit against Underwood or other persons or parties possibly, instead of the Levys . . . .?" II-RT 20. Counsel's only response was that the cases he read did not raise laches as a bar and that the Levys had vacated the house prior to petitioner taking possession. II-RT 21-22. Petitioner argued that the most the Levys were entitled to was an independent action to quiet title "so that a judge or jury might determine, based upon a full exploration of the facts

and circumstances, as to who is entitled to possession and title as opposed to each other." II-RT 24.

In the course of his ruling, Judge George made several observations. First, he found no justification for the 11 year delay in seeking to set aside the 1971 judgment. II-RT 43-44. Second, the court noted: "Mr. Fleming's present counsel should have by way of supplemental written presentation or orally at the time of the hearing on October 9, 1985, brought to the Court's attention the fact that Mr. Underwood was no longer in possession and that in fact there were good faith purchasers or at least purchasers who might be purchasers in good faith in existence inasmuch as that was a material consideration for the Court." II-RT 44. Finally, Judge George observed that "somebody involved in these proceedings must go to court against the title company, that given the delay and all the other circumstances I have alluded to, it is more equitable that Mr. Fleming, with his laches and other conduct, be the one to have to obtain monetary damages from the title comapny [sic] or some prior title holder rather than the Levys who took in good faith and in the Court's opinion without any negligence or transgression committed by them with regard to these various proceedings." II-RT 45.

Judge George further stated:

> ". . . I would not have signed the order December 11, 1985, had I been aware of the existence of subsequent purchasers. That is subsequent to Mr. Underwood. And certainly not if I had any indication that they were bona fide purchasers which I am finding on

this state of the record the Levys to be." II-RT 46.

The court deemed the signing of the order "clerical error," "inadvertence," and encompassing relief broader than intended, especially in regard to relief against third parties. II-RT 48.

Petitioner's counsel expressed concern that a finding that the Levys were bona fide purchasers would destroy any quiet title action. II-RT 49. The court responded: "I made only that sort of finding and observation which I think is pertinent to the resolution of what is before me and I am not indicating that I am precluding a full litigation in the quiet title action of that question." II-RT 49-50. As the court explained, although it was modifying its previous order and restoring the Levys to possession of the property, it was doing so "*without prejudice to any of the parties . . . .*" II-RT 49, emphasis added; see also II-RT 50. The court also stated: "I have no problem with restoring the Levys to the possession they were in prior to this order except that *I do not want anything that the Court does to be taken as a resolution of the claims that Fleming may have against Underwood.*" II-RT 32-53, emphasis added.

The "Order Correcting and Modifying Order of December 6, 1985 Re Motion of Cross-Defendant Edward J. Fleming" was signed on June 6, 1986. CT 483-489. The corrected order still provided that the default against petitioner and in favor of Underwood be vacated and set aside. CT 487-489. Petitioner timely filed a Notice of Appeal "from the 'Order Correcting and Modifying Order of December 6, 1985 re Motion of Cross-Defendant Edward J. Fleming' filed on June 6, 1986." CT 490-491.

Petitioner's opening brief in the Court of Appeal raised four issues: (1) Was the June 6, 1986 modification of the December)6, 1985 order properly made under the doctrine of clerical error? App. Opn. Br. 16-23; (2) assuming the December 6, 1985 order contained clerical errors, did the court have jurisdiction to enter ancillary orders? App. Opn. Br. 23-24; (3) the Levys were legally chargeable with notice that Underwood's title was void and that their own title was defeasible, App. Opn. Br. 25-27; and (4) the court erred in granting the Levys leave to intervene. App. Opn. Br. 27-31.

At no time did petitioner's appellate counsel challenge the superior court's determination that the 1971 Underwood judgment was void. In fact, petitioner specifically disclaimed raising such issues: "[1] As set forth more fully in Fleming's motion, the default judgment was void upon its face. The reasons that it was void upon its face *are not germane to this present appeal,* but are detailed in the motion." App. Opn. Br. 2, emphasis added.

The Levys' responsive brief on appeal advanced numerous points: (1) The trial court had the authority to correct its previous order under the doctrine of clerical error, Resp. Br. 10-19; (2) the trial court had the authority to issue ancillary orders, Resp. Br. 19; (3) the Levys were bona fide purchasers whose title could not be dispossessed by a void judgment in their chain of title, Resp. Br. 20-28; (4) the trial court was without jurisdiction to quiet title as against third parties who had no notice of the action, Resp. Br. 28-30; (5) the Levys had standing to intervene, Resp. Br. 30-33; and (6) sanctions should be awarded for maintaining a

frivolous appeal. Resp. Br. 33-35. At no time did the Levys address or raise issues concerning the propriety of vacating and setting aside the default judgment obtained against petitioner by Underwood.

In the first part of its decision, the California Court of Appeal concluded that the Levys had standing to intervene as persons affected by the judgment of the court below. A - 8-11. In the second part of its opinion, the Court of Appeal held that the superior court erred in correcting the December 6, 1985 order on the basis of clerical error. A - 12-15. However, in an effort to afford broader relief to the Levys, the Court of Appeal reached out to decide issues adversely to petitioner concerning the validity of the Underwood judgment. A - 15-23.

Additionally, the California Court of Appeal held that petitioner should be denied all relief because he proceeded with unclean hands. A - 23-30. The appellate court declined to impose sanctions, A - 30. However, pursuant to California Business and Professions Code section 6086.7, the court notified the State Bar of California that it had reversed the present judgment due to willful misrepresentations which misled the trial court with regard to material facts. A - 31. Finally, the Court of Appeal's decision vacated both the June 6, 1986 and December 6, 1985 orders and directed the trial court to deny petitioner's June 4, 1985 motion for relief *with prejudice*. A - 31-32.

On or about September 28, 1988, petitioner filed both his "Appellant's Petition for Rehearing" and "Appellant's Petition for Mandatory Rehearing" in the Court of Appeal. Petitioner therein urged reconsideration of its decision on the ground that no appeal had

been taken from the December 6, 1985 judgment. His petition pointed out that the merits of the issues raised in his original motion to set aside the default (as reflected in the December 6, 1985 order) were never briefed or argued on appeal, and the court had never given prior notice that it intended to consider and decide such issues. App. Ptn. Rehg. 3.

Petitioner further insisted that rehearing was mandatory under the present circumstances pursuant to California Government Code section 68081, which provides in relevant part:

> "Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

Notwithstanding these grounds, the petitions for rehearing were denied summarily on October 12, 1988, without provision for supplemental briefing. A (Order denying rehearing).

On or about October 21, 1988, petitioner filed both a "Petition for Review" and "Petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief" in the Supreme Court of California. In both pleadings petitioner sought relief from the Court of Appeal's failure to grant mandatory rehearing

pursuant to Government Code section 68081. In both instances, petitioner asserted that he was denied "his constitutional guaranty of due process of law. . . ." Ptn. for Rev. 12; Ptn. for Writ of Mandate, etc. 18. Both petitions were summarily denied by the California Supreme Court on November 30, 1988. B-1.

REASON FOR GRANTING THE WRIT OF CERTIORARI

THIS CASE PRESENTS A COMPELLING VEHICLE FOR THIS COURT TO ADDRESS THE IMPORTANT RIGHTS OF NOTICE AND OPPORTUNITY TO BE HEARD GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN THE CONTEXT OF APPELLATE PROCEEDINGS WHEREIN ISSUES NEVER RAISED ON APPEAL OR BRIEFED BY THE PARTIES ARE DECIDED WITHOUT GRANTING PETITION FOR REHEARING AS REQUIRED BY STATE STATUTE

As this Court emphasized in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972):

> "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin v. Hale*, 68 U.S. 223, 233. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliot*, 167 U.S. 409; *Grannis v. Ordean*, 234

> U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552."

The Constitution's requirement of notice and opportunity to be heard encompasses more than just notions of fair play. "Its purpose, more particularly, is to protect [a person's] use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property . . . ." *Fuentes v. Shevin, supra*, 407 U.S. at 80-81. The risk of arbitrary deprivations are minimized when an individual is given the opportunity to be heard:

> "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' [Citation omitted.]" *Id.* at 81.

In spite of the foregoing precepts, it has often been said that appellate review and petitions for rehearing or new trial are not essential elements of due process of law. *Pittsburgh, C.C. & St. L. R. Co. vs. Backus*, 154 U.S. 421, 426-427 (1894); *James v. Appel*, 192 U.S. 129, 137 (1904); *Ohio ex rel. Bryant vs. Akron Metropolitan Park*

Dist., 281 U.S. 74, 80 (1930). Nevertheless, such broad statements have always been tempered with the realization that the guarantee of due process does contemplate that ample opportunity to be heard must have been afforded at some stage of the proceedings.

For example, in *Pittsburgh, C.C. & St. L. R. Co. v. Backus, supra*, 154 U.S. at 426-427, it was said: "Rehearings, new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." Likewise, in *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., supra*, 281 U.S. at 80, Chief Justice Hughes explained: "As to the due process clause of the 14th Amendment, it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."

This Court has briefly touched upon claims similar to those presented by petitioner in *Saunders v. Shaw*, 244 U.S. 317 (1917). That case involved a state suit for an injunction against the collection of a drainage tax. At trial, evidence that the land in question was outside of the levee system and would derive no benefit was objected to by the defendant and excluded as inadmissible. However, such evidence was "spread upon the record and completed in order to carry the case to the supreme court." *Id.* at 318. Defendant offered evidence that the land was not in the Gulf of Mexico. But when plaintiff attempted through cross-examination to show the physical condition of the property, defendant successfully objected that the subject was foreclosed by the court's previous ruling.

Judgment was entered for defendant and intervener, which was initially affirmed on appeal by the state supreme court. *Id.* at 318-319.

Rehearing was granted, however. Recognizing that the answer and testimony showed that the land in question was low and marshy, had not been benefited, and could not be drained, the state supreme court reversed its prior judgment and granted an injunction against the assessment upon the land. *Saunders, supra,* at 319. Defendant sought a rehearing, which was denied under a court rule which provided that only one rehearing should be granted. *Ibid.* Defendant brought a writ of error to this Court claiming that he had been "deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the opportunity to present his evidence." *Ibid.* This Court agreed with defendant that his right to due process of law had been violated and reversed the judgment. *Id.* at 320.

The *Saunders* decision also addressed the question of whether the defendant's claim of constitutional error was properly raised. In holding that it was, the Court explained:

> "The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the final day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, *done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it*

> *would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.* The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U.S. 278. It appears that shortly after the supreme court has declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done." *Saunders v. Shaw*, 224 U.S. at 320, emphasis added.

Subsequent opinions of this Court have cited *Saunders v. Shaw, supra*, both for the proposition that the Fourteenth Amendment right to due process of law may be implicated when an appellate court surprises a party or creates some innovation, and that in such circumstances constitutional claims are timely raised after the appellate court has thus acted. In *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932), for instance, it was explained:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth

> Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entertaining judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. [Citations omitted.] *This is not a case where, as in Saunders v. Shaw,* 244 U.S. 317, 320, *the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court.*"

Id. at 163-164, emphasis added and footnote omitted. Similar expressions are found in *Helis v. Ward,* 308 U.S. 365, 369-370 (1940) and *Butler Brothers v. McColgan,* 315 U.S. 501, 509-510 (1942).

The instant case, on the other hand, directly implicates the principles expressed by *Saunders.* Petitioner without question was surprised by the breadth and depth of the California Court of Appeal's holding and disposition. Without notice or an opportunity to be heard, the Court of Appeal decided issues neither raised on appeal, briefed, or argued by the parties. No appeal was ever taken from the December 6, 1985 order vacating and setting aside the 1971 default judgment obtained by Underwood against petitioner. The relief sought by the Levys was modification and correction of the December 6, 1985 order to restore them to possession and title of the

residence. CT 185-202. The Levys never challenged the trial court's determination that the 1971 Underwood judgment against petitioner was void. Even on appeal, the Levys maintained only that they did not and could not have notice that the Underwood judgment was void because it was procured by fraud. Resp. Br. 21-22.

Not even the trial court after learning of the misleading nature of counsel's representations saw fit to vacate that portion of the December 6, 1985 order granting petitioner relief as against Underwood. Cf. II-RT 43-51; CT 487-489. The Court of Appeal went out of its way to reach issues not presented on appeal and to order a dismissal of petitioner's action against Underwood, *with* prejudice, without his having notice or an opportunity to be heard before important property rights vis-a-vis Underwood were irrevocably extinguished. See A - 31-32.

Petitioner called this unanticipated deprivation of due process to the attention of the Court of Appeal in two separate petitions for rehearing which he timely filed after the appellate decision was rendered. In both petitions, specific reference was made to California Government Code section 68081, which provides for rehearing in the appellate courts of California upon specified conditions:

> "Before the Supreme Court, a court of appeal, or the appellate department of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, *the court shall afford the parties an opportunity to present their views* on

> the matter through supplemental briefing. *If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.*" Cal. Gov. Code §68081, emphasis added.

The note in 18 Pacific Law Journal 539 (1987) indicates that the provisions of section 68081 are mandatory. See also: *Adoption of Alexander S.*, 44 Cal.3d 857, 864-865 (1988); cf. *People v. Floyd P.*, 198 Cal.App.3d 608, 612, fn. 2 (1988); *People v. Loudermilk*, 195 Cal.App.3d 996, 1004, fn. 1 (1987).

California Government Code section 68081 clearly represents this state's legislative directive that the parties involved in appellate proceedings be afforded the requisite notice and opportunity to be heard which is encompassed in the due process clause of the Fourteenth Amendment. When an appellate court disregards the statutory mandate and broadens the scope of review in order to decide issues not framed by the parties, the same concerns about abridging notice and hearing rights are implicated as in the context of trial court proceedings. As this Court's *Fuentes decision? recently observed in the latter setting:*

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property

. . . ." *Fuentes v. Shevin, supra,* 407 U.S. at 80-81.

Those same fundamental principles are no less at stake when it is an appellate court that reaches out to decide issues never raised by the parties. When such appellate action adjudicates an individual's claim pertaining to his or her interest in the use and possession of property, the result of the court's denying a meaningful opportunity to be heard may be drastic — indeed, the permanent extinguishment of that property interest.

The constitutional command of due process, as well as the state's statutory law encompassing due process concerns, required that petitioner at least be able to address issues raised for the first time by the decision of the California Court of Appeal. Certainly this must be so when that decision leads directly to the deprivation and final termination of a person's property rights, as occurred in this very case by virtue of the court's unrequested, and unwarned, dismissal of Fleming's action against Underwood with prejudice.

CONCLUSION

The California Court of Appeal's refusal to grant rehearing after its opinion reached issues never raised on appeal or briefed by the parties was a clear denial of petitioner's right to due process of law as encompassed by the Fourteenth Amendment to the United States Constitution. This case raises fundamental constitutional questions heretofore given little or no treatment in the context of appellate proceedings. Petitioner

respectfully prays for the issuance of a writ of certiorari to address the important question presented by this case.

Respectfully submitted,

LAW OFFICES OF
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DENNIS A. FISCHER

Attorneys for Petitioner

**Counsel of Record*

APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THOMAS R. MORGAN,	**B022367**
Plaintiff and Cross-Defendant,	**(Super. Ct. No. C845685)**
vs.	
CHARLES UNDERWOOD,	
Defendant and Cross-Complainant,	
EDWARD J. FLEMING,	
Cross-Defendant and Appellant,	
SHUKI Y. LEVY and DEBORAH DALE LEVY,	
Interveners and Respondents.	

COURT of APPEAL - SECOND DIST.
FILED
SEP 13 1989
ROBERT N. WILSON Clerk
Deputy Clerk

APPEAL from a post-judgment order of the Los Angeles County Superior Court, Ronald M. George, Judge. Reversed.

Herzfeld & Rubin, Martin S. Friedlander and David E. Wheeler for Cross-Defendant and Appellant Fleming.

Cooper, Epstein & Hurewitz, Carl Grumer and Jeffrey D. Spilman for Interveners and Respondents Levy.

Mr. Fleming appeals from a post-judgment order which modified a final judgment of the trial court. The final judgment, in effect, had quieted title to certain real property in appellant Fleming; and the Levys, blameless third parties who were unknown to the court at the time of the hearing, were thereby dispossessed. The post-judgment order sought to remedy the inequitable result of the earlier ruling. In the interests of justice, we reverse the trial court by vacating both the post-judgment order and the judgment, and we direct the trial court to deny with prejudice Fleming's underlying motion for relief.

BACKGROUND

This case has a somewhat complicated history. Approximately 25 years ago, Thomas R. Morgan brought an action against Charles Underwood for specific performance of an oral partnership agreement, among other causes of action. Underwood cross-

complained against Morgan and against Edward J. Fleming, the appellant herein. Fleming's default was entered, and on March 1, 1971, the trial court found in favor of Underwood on both the complaint and cross-complaint. It awarded Underwood approximately $13,000 in principal, interest, and costs as against Fleming. In July, Underwood obtained a writ of execution of the judgment; and in September, after due notice, the Sheriff conducted a sale of Fleming's residence at 2600 Zorada Drive to satisfy the judgment. Underwood was the high bidder and purchased the property for approximately $15,000. The record indicates that Underwood later initiated an unlawful detainer action to gain possession of the property.

The property on Zorada Drive eventually was sold to the Levys, respondents herein, on May 23, 1978, for $210,000, the fair market value at that time.[1]

On June 4, 1985, Fleming filed a motion to set aside and vacate the default judgment, cancel and vacate the abstract of judgment and writ of excution, vacate and set aside the sheriff's execution sale, cancel the sheriff's deed, and dismiss underwod's cross-complaint. Fleming asserted that the judgment was void on its face.

Mr. Underwood was served with notice and a copy of the motion, but did not appear.[2] Although both

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[1] The superior court file, of which we take judicial notice (Evid. Code § 452, subd. (d) (1)), contains a declaration by Mr. Underwood, dated April 22, 1986, stating that he "long ago sold this real property to a third party, who sold to yet another third party, who sold it to yet another third party." The last sale presumably was to the Levys.

[2] The record reflects that copies of the notice of a June 24

Fleming and his Attorney knew at least by the time the hearing was held on October 9, 1985, that Underwood no longer owned the property, the Levys were neither served nor otherwise given notice.[3]

The October 9 hearing was conducted by Judge George, and only Fleming appeared. Fleming's attorney did not inform the court of the Levys. The

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hearing and the motion were mailed on May 30 to a law firm which had represented Underwood in this matter in 1974. The documents were received on June 6. The firm had not had contact with Underwood since 1974 and was unable to locate him. An attorney from the firm, as "an officer of the court, " requested a continuance of the scheduled June 24 hearing, based in part on the fact that Underwood had been represented by other counsel in a 1976 unlawful detainer action. Fleming opposed the motion, insisting that he had served Underwood's attorneys of record. His counsel argued that "the record in *this* case reflects that said law firm is the last attorney of record in this case." On June 20, Fleming, through his attorney, provided the firm with the address of Underwood's current residence, an address different from that of the property in dispute. On June 24, Judge Newman continued the hearing. On July 24, Judge Newman denied Fleming's motion on the basis that it was "notice deficient." On September 17, Fleming served Underwood.

[3] Fleming argues that the applicable law did not require that notice be served on the Levys because their title derived from that of Underwood, whose title was void, and that the Levys were legally chargeable with notice of the void title and the defeasibility of their own. Fleming points to a number of cases in support of this argument, especially *Bullard v. McArdle* . . . 1893) 98 Cal. 355, *DiNola v. Allison* (1940) 143 Cal. 106, *Mills v. Laing* (1918) 38 Cal. App. 776, and *Arrow Sand & Gravel, INc. v. Superior Court* (1985) 38 Cal.3d 884. However, the cases on which Fleming relies involve the impact of a pending appeal on various property interest. In the instant case, no appeal was ever taken from Underwood's judgment against Fleming, which stood undisturbed from 1971 until December 6, 1985.

superior court file was missing, and no document before the court reflected that Underwood was no longer the owner of the Zorada Drive property. The court took the matter under submission. By minute order dated October 16, it granted Fleming's motion.[4]

On Ocotober 25, Fleming served notice of the ruling on Underwood's former attorneys and on Underwood, the latter by mail addressed to his residence.

In a lengthy letter to the court dated November 20, more than one month after the motion had been granted, Fleming's attorney emphasized that it was "very important that Mr. Fleming be awarded restituton of his home and his pesonal property located therein." The Levys were not mentioned.[5] (Please see addendum.)

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[4] The superior court file was "missing" and consequently unavailable to the trial court on at least three occasions during these proceedings: on June 24, 1985, when Judge Newman continued the hearing on Fleming's motion; on October 9, 1985, when Judge George conducted the hearing; and on May 23, 1986, when Judge George heard the Levys' applications for relief. To better analyze the maaters before us, we ordered the superior court file; it is woefully incomplete. Even though the case was filed in the early 1960s, the file contains no original document dated earlier than Fleming's June 4, 1985 motion for relief. There are some photocopies of earlier documents, but these turn out to be nothing more than the exhibits Fleming garnered in support of his motion to vacate the underlying judgment. Although the minute order of October 16, 1985, wherein the court granted Fleming's motion, reflects that the court had the file at that point in time, there is, of course, no indication of its contents.

[5] The court was misled by both the oral and written statements of Mr. Frielander, Fleming's attorney. To mislead the court is a violation of one's oath, duties, and ethical obligations as an attorney. (Bus. & Prof. Code, §§ 6067, 6068, subd. (d).)

Enclosed with the letter was an 11-page draft of a proposed order which counsel had prepared for signature by the trial court. The proposed order gave relief against Underwood, his family, and "all those in privity with them, whether as assignees, vendees, transferees, lessees, encumbrancers. attorneys, agents, or otherwise, who have entered under them, whether with or with out notice of this action . . . " This language had not been a part of Fleming's original motion. In compliance with a request by Judge George, Fleming served the proposed order on Underwood. Fleming did not serve the Levys. Judge George has his clerk inform Fleming's attorney that the court would hold the proposed order for 14 days to allow for objections from Underwood. The file does not indicate the Underwood filed objections at this time. The order was signed by the court on December 6, 1985, and was recorded the same day.

On or about April 7, 1986, during a period when the Levys were on vacation in Mexico, a uniformed Los Angeles County Marshal posted a notice to vacate and writ of possession at the Zorada Drive property. The notice required that the property be vacated April 12.[6] On or about April 14, the property went into escrow in anticipation of its being sold by the Levys to a Mr. and Mrs. Myers. They Levys returned fron their vacation

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[6] The "Notice to Vacate," which was addressed to "Charles Underwood," stated in part: "If you claim a right to possession of the property accruing prior to the commencement of the Unlawful Detainer action, or claim to have been in possession of the property on the date of the filing of the Unlawful Detainer action and are not named in the attached writ, contact the Marshal's Offices set forth on this Notice." There is nothing before us which reflects that Fleming had filed an action in unlawful detainer.

on April 17 to find that they had been locked out of the Zorada Drive property. Fleming proceeded to move into the residence.

(The superior court file discloses that on April 22, 1986, Underwood, represented by a new attorney, applied ex parte to Judge Newman for a temporary order restraining further enforcement of Fleming's writ of possession until the court could reconsider Fleming's motion to vacate the underlying judgment. In support of his application, Underwood declared that Fleming had been served in the underlying action. Fleming opposed the application on the basis that the December 6 order had enjoined Underwood from the proceedings, that Underwood had been properly served with Fleming's motion to vacate, that there was a substantial likelihood that personal property remaining in the Zorada Drive property, as referenced in the December 6 order, would disappear because a stay would give Underwood time to conceal the property, and that personal property valued at over $745,000 which Fleming had recently moved into the Zorada Drive residence "might well'disappear' " if there were any delay. Underwood's application was denied. Fleming's attorney expected Underwood to file a motion to reconsider the December 6 order, but the file does not reflect that such motion was filed or that any hearing on the matter was held.

In several appearances before the trial court, the Levys applied for relief. In an order dated June 6, 1986, "correcting and modifying" the order of December 6, 1985, the court omitted language in the original order which had restored the real property to Fleming, and instead, restored possession to the Levys.

Fleming appeals.

DISCUSSION

Fleming contends that the Levys did not have standing to intervene and the the court otherwise erred in modifying the December 6, 1985 order.

Respondents contend that this appeal is frivolous and request an award of sanctions.

1. *Standing.*

Fleming first contends that the Levys, who were not parties to the underlying action of *Morgan v. Underwood*, failed to comply with the requirements of Code of Civil Procedure section 387, subdivision (a) (387 (a)) and therefore did not have standing to intervene. Whether the standards for intervention have been met is a determination left to the sound discretion of the trial court. (*Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 109.)

Section 387(a) provides in pertinent part as follows: "Upon timely application, any person, who has an interest in the matter in litigation, . . .may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, . . .and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served . . .upon the attorneys of the parties who have appeared,. . .in the manner provided for service of summons or in the manner provided by Chapter 5 (commencing with Section 1010) Title 14 of Part 2. . ."

Parties may intervene, if otherwise appropriate, at any time, even after judgment. (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437.) A right to

intervene should be asserted within a resonable time, and an intervener must not be guilty of an unreasonable delay after knowledge of the suit. (*Allen v. California Walter & Tel. Co.* (1947) 31 Cal. 2d 104, 108.) In the matter before us, the Levys were completely unaware of the instant case prior to April 17, 1986, when they returned from their vacation and found that they were locked out of the Zorada Drive property. By April 23, they were before Judge Cole seeking relief under an ex parte application for a temporary restraining order and for an order "correcting" the December 6 order. Obviously, the Levys were diligent in asserting their rights, which shortly led to their being made parties to the action.

After much discussion, neither the court nor the Levys were sure whether they should bring a separate action or continue in the instant case in their quest for relief. The court clearly recognized the intent of the Levys to become involved and granted them immediate relief through a temporary restraining order and order to show cause why the court should not modify the December 6 order and give additional relief. The court further ordered the Levys to post bond and to personally serve on Fleming's attorneys a copy of the order "together with the Ex Parte Applications, Declaration and Memorandum of Points and Authorities filed herein" not later that April 28. The Levys met all conditions. The court granted the Levys leave to file appropriate pleadiings by May 6. Their complaint in intervention, setting forth grounds, was filed April 30.

As Fleming points out, the file does not contain a proof of service of the complaint. However, Fleming's counsel declared, in support of a motion to strike the complaint in intervention, that on May 14 he had

received a copy of the complaint file stamped April 30, 1986, and a proof of service by mail dated May 13, 1986.

An intervener becomes an actual party to the suit by virtue of the order authorizing him to intervene. (*Hospital Council of Northern California v. Superior* (1973) 30 Cal.App.3d 331, 336.) At the May 23 hearing on the order to show cause, Judge George explicitly granted the Levys' request for standing. This was reflected in his order filed June 6.

Although the above facts indicate that the Levys indeed acquired standing as interveners, Fleming argues that this is not so because the court failed to state either during the May 23 hearing and or in its June 6 order that it was giving nunc pro tunc effect to the complaint in intervention file April 30. Fleming fails to cite any authority for this position.

It has been held that one may be allowed to intervene on oral motion without supporting documents when the motion is made in the presence of the attorneys for the parties and the applicant adequately informs the court and the parties of the basis for the motion. (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 157.) Here, Fleming was represented at every hearing and was timely served with all documents. There was no confusion regarding the grounds on which the Levys desired to intervene, albeit there was some indecision as to procedural matters.

The purpose of 387(a) is to promote fairness, to insure maximum involvement by all responsible, interested persons affected by the judgment, to obviate delay, and to prevent a multiplicity of actions. (*Mary R. v. B.& R. Corp.* (1983) 149 Cal.App.3d 308, 314.) Without warning, the Levys had lost title and physical

access to their property. Judge George made the appropriate order; there was no abuse of discretion.

2. *The June 6 Order.*

a. *Judicial Error*

The grounds on which the Levys sought injunctive relief and amendment of the judgment were that the December 6 order had been entered as the result of clerical mistake or inadvertence and did not reflect the intention of the trial court since the order, drawn by Fleming's attorney, far exceeded the relief originally requested. The trial court agreed and based its June 6 order on its conclusion of law that the December 6 order had been signed as the result of clerical error.

There is both an inherent and a statutory right for a court to cause its judgment to be correctly set forth. (*Estate of Eckstrom* (1960) 54 Cal. 2d 540, 547; *Gravert v. DeLuse* (1970) 6 Cal.App.3d 576, 582.) However, while a court can correct the record of the judgment, it cannot alter the judgment actually rendered, "even though the propsed amendment contains matters which ought to have been so pronounced." (*Estate of Eckstrom*, supra, 54 Cal.2d at p. 544.) This doctrine is usually explained through the use of the terms "judicial error" and "clerical error." The distinction is " 'whether the error was made in rendering the judgment, or in recording the judgment rendered.' [Citation.] . . . [1] An amendment that substantially modifies the original judgment or materially alters the rights of the parties, may not be made by the court under its authority to correct clerical error. . .unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion.

[Citation.]" (*In re Canderlario* (1970) 3 Cal.3d 702, 705; and see *Craven v. Crout*. . .1985) 163 Cal.App.3d 779, 782.) In *Gravert v. DeLuse, supra*, 5 Cal.App.3d at page 581, it was said that '[t]he disctinction between a clerical error and a judicial error . . . does not depend so much on the person making it as on *whether it was the deliberate result of judicial reasoning and determination.*"

In determining whether an error is clerical or judicial, great weight should be placed on the declaration of the judge as to his or her intention in signing the order. (*Gill v. Epstein* (1965) 62 Cal.2d 611, 615.) Where there is a conflict in the evidence, the conclusion of the trial court will probably be accepted on review; however, where the record clearly shows that there was no clerical error, the recital of the trial court will not be conclusive. (*Morgan v. State Bd. of Equalization* (1949) 89 Cal.App.2d 674, 682; *Nathanson v. Murphy* (1957) 147 Cal.App.2d 462, 469.)

In the case at bar, the trial court stated as a conclusion of law in its June 6 post-judgment order that the December 6 order had been signed as the result of clerical error. Our review of the evidence shows that the trial court was sufficiently uneasy about Fleming's motion that it delayed signing the judgment for 15 days in order to give Underwood, the only interested party of whom the court was aware, an additional chance to be heard. Then, based on the documents put forward by Fleming and on inferences drawn from representations made by his attorney, the court ultimately gave the relief sought. That relief effectively quieted title in Fleming. Thus, the trial court did exercise its judicial discretion.

When the court learned of the resulting plight of the Levys, it attempted to roll back the judgment by giving Fleming relief only as against Underwood. However, a court cannot amend a final judgment simply on the basis that new evidence has come to light. (Cf. *Stevens v. Superior Court* (1958) 160 Cal.2d 264, 270.) In addition, the relief granted to the Levys was accomplished through a substantial modification of the original judgment, and that modification materially altered Fleming's rights: he no longer had title or access to the Zorada Drive property.

There is no conflict in the evidence, and our review of it leads us to conclude that the error cannot be termed "clerical." The decision which the trial court later sought to correct was the result of judicial reasoning and determination and therefore could not be modified under the clerical error doctrine.

At this point, we briefly discuss a case cited by Fleming in support of his argument that the court's error, if any, was judicial and not clerical: *Landton v. Superior Court* (1936) 5 Cal.2d 694. Fleming specifically calls to our attention the following language from that case: "If the Court miscontrued the evidence before it, or misapplied the laws applicable to the facts disclosed by the evidence, *or was even misled by counsel* such an error was in no sense a clerical error which could thereafter be corrected by the court. . .." (At p. 696; emphasis supplied.) Fleming seeks to expand this language to cover a fraud on the court: his failure to disclose that Underwood no longer owned the subject property. *Lankton* has never been cited for this purpose. Furthermore, an examination of *Lankton* and of the cases on which it ultimately relies shows that "misled" is used only in the sense of "inadvertent."

(*First National Bank of Fresno v. Dusy* (1895) 110 Cal.77; *Forquer et al. v. Forquer* (1857) 19 Ill. 68, 71.) Although we conclude that the court's error was not clerical, we decline to apply the language of *Lankton* to the facts of the case at bar.

While relief was not available to the Levys under the clerical error rule, other grounds exist.

a. *Fleming's theory of relief.*

In his motion to vacate the underlying judgment, Fleming asserted that the judgment was void on its face on the eight separate grounds. A judgment is not "void on its face" unless its invalidity is apparent from an inspection of the judgment roll. (*People v. Davis* (1904) 143 Cal. 673, 675.) As discussed below, we conclude that Fleming's assertion is without support. We consider the eight grounds seriatim.

(1) With regard to the summons and second amended cross-complaint, he was never personally served as "Edward J. Fleming" and service on "Edward J. Flemming" was based on a false return of service.

A slight error in spelling which does not destroy the virtual identity of the name (*idem sonans*) can be entirely disregarded. (*Brum v. Ivins* (1908) 154 Cal. 17, 20.) The misspelling of "Fleming " is such an error, and it could have been readily corrected by amendment of the return or testimony as to service. See "Comment-Judicial Council" uner section 417.10 of the Code of Civil Procedure as set forth in West's Annotated Code, which provides in pertinent part: "[I]f the process is in correct form, properly issued and served, and the proof of service is timely filed with the

clerk, a defective affidavit will not destroy jurisdiction; the court may permit an amendment of the affidavit to conform to the facts." (*Ginns v. Shumate* (1977) 65 Cal.App.3d 802, 806.)

The summons and return of service are part of the judgment roll (Code Civ. Proc., § 670, subd. (b)), and both documents show service on "Edward J. Flemming." Fleming's argument that he was never peronally served is based on his own declaration and on a statement by Royal M. Hassrick. These documents were submitted in support of his motion to vacate and are outside the judgment role. (Code Civ. Proc., § 670 subd. (b).)

(2) Fleming was never personally served with the motion to correct the spelling of his name nunc pro tunc on the cross-complaint so amended, and no declaration of personal service in the file establishes that he was personally served with these documents. Therefore, the effect of the amendment was to add a new cross-defendant -- Edward J. Fleming -- after the statute of limitations had run.

Notice of these subsequent proceedings, which amended the complaint as mere matter of form, was not required after Fleming's default was duly entered. (Code Civ. Proc., § 1010, *Heathman v. Vant* (1959) 172 Cal.App.2d 639, 647, *Thompson v. Cook* (1942) 20 Cal. 2d 564, 568; and see *Engelbretson & Company, Inc. v. Harrison* (1982) 125 Cal.App.3d 436, 440.)

(3) The summons on the second amended cross-complaint was allegedly served on June 24, 1970, and returned on July 3, 1970, in violation of the three-year provision of 581a, subdivision (a).

Former section 581a, subdivision (a) generally provides for mandatory dismissal if return of service is

not made within three years after commencement of an action. However, this requirement did not apply to cross-complaints until subsection (b) was added in 1970. (See e.g., *Welden v. Davis Auto Exchange* (1957) 153 Cal.App.2d 515, 519.) The original cross-complaint in the case at bar was file October 1, 1964; the first amended cross-complaint was filed November 30, 1964; and the second-amended cross-complaint was filed September 16, 1969. The former rule does not apply.

The modern rule is that a judgment based on a late return of summons is irregular, but not void. (*National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 415-416.)

No motion to dismiss had ever been made in this action prior to Fleming's motion of June 4, 1985.

(4) The default against Edward J. Flemming was entered on March 2, 1971, more than five years after the filing of the original cross-complaint in violation of Code of Civil Procedure section 583, subdivision (b).

Former section 583, subdivision (b) provides for dismissal of an action which is not brought to trial within five years. However, the period of pendency of an appeal is excluded from the five-year computation (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 916-917), as well as the period of time between date a default judgment is entered and the date the default is set aside (*Heward v. Cromwell* (1963) 216 Cal.App.2d 613, 616). In Fleming's own motion to vacate he states that the court entered judgment on the complaint in favor of Morgan as against Underwood on April 12, 1967, which was affirmed on appeal by remittitur filed April 4, 1969, and that on June 30, 1969, Underwood filed a motion to vacate the default

and default judgment entered against him, which was granted September 10, 1969. None of the relevant documents is contained either in the record before us or in the superior court file. Under Fleming's own pleading it appears that the running of the five-year period was tolled for roughly two years, and therefore Fleming's default was entered within the five year period.

(5) In violation of section 580, the second amended cross-complaint did not pray for interest and the request to enter default did not request interest.

Section 580 provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint. . . ." As stated in *National Diversified Services, Inc. v. Bernstein, supra,* "The policy behind this statute is that a defendant is entitled to be informed of the maximum liability which he will face if he chooses to default. [*Citations.*] (168 Cal.App.3d at p. 417.) Under the first cause of action of the second amended cross-complaint Underwood states that "there is now due and unpaid from cross-defendants to cross-complainant the sum of $5,500.00 with interest thereon at the rate of 7% per annum from July 5, 1964." This is nothing more than legal interest. The statement in the body of the complaint was adequate to inform Fleming of his liability.

The entry of a default by the clerk is merely a ministerial act (*Bristol Convalescent Hosp. v. Stone* (1968) 258 Cal.App.2d 848, 862), and it is not essential to the entry of a valid judgment against a defendant (*Crouch v. H.L. Miller & Co.* (1915) 169 Cal. 341, 345). A clerk has the authority to enter a default judgment for amounts alleged and prayed for where the judgment is

based on an oral promise to pay specific sums set forth in an action arising on contract for the recovery of money. (*Norman v. Berney* (1965) 235 Cal.App.2d 424, 430-431.) The clerk may enter judgment where a contract provides for some definite, fixed amount of damages or where such may be ascertained by computation made by the clerk. (*Ford v. Superior Court* (1973) 34 Cal. App.3d 338, 342.) In the case at bar, damages were based on causes of action for breach of contract, the amounts were clearly set forth, and nothing more than legal interest was requested. As discussed above, the complaint gave notice of the extent of liability to the defaulting defendant. The omission of the clerk to include legal interest could easily have been corrected. In addition, a request to enter default is not part of the judgment role. (Code of Civ. Proc., § 670, subd. (b).) The omission did not result in a judgment void on its face.

(6) The request to enter default filed September 15, 1970, did not request costs, nor did the memorandum of costs attached to said request include costs.

The second amended cross-complaint prayed for costs. The photocopy of the relevant page of the September 15 request to enter default is of such poor quality that we cannot ascertain whether or not the costs were included. In any event, as in (5), above, such an omission did not make the judgment void on its face.

(7) The file does not reflect that Fleming was served with a memorandum of costs although the judgment included an award of costs.

A memorandum of costs is not part of the judgment role. (Code Civ. Proc. § 670, subd.(b).) Many documents are missing from the file.

(8) The sum requested in the second cause of action is included in the first cause of action and therefore the judgment exceeded the prayer as measured by the body of the complaint.

We construe the language of the two causes of action to mean that various breaches by the cross-defendants resulted in damages of $5,000 with respect to each of two separate undertakings. The figures are accurately reflected in the prayer. The defaulting cross-defendants were thus on notice regarding this potential liability, and the judgment is not void on its face on this basis.

In summary, there is no support for Fleming's assertion that Underwood's judgment against Fleming is void on its face.

While judgment void on its face may be set aside by motion with no limit on the time within which the motion must be made (*Young v. Young* (1970) 14 Cal.App.3d 1, 4), a judgment valid on its face may be set aside on the ground that it is void only on a motion made within a *reasonable time.* (*Smith v. Jones* (1917) 174 Cal. 513, 516.) Generally, a reasonable period of time has been held to be one year from entry of judgment. (See *People v. One 1941 Chrysler* (1947) 81 Cal.App.2d 18, 25.) In the case of a false return of summons, which Fleming asserts as a ground in his motion to vacate, the motion can be made after a year has elapsed: the time limit is "a reasonable time from discovery of the default judgment irrespective of when it may actually have been entered. [Citations.]" (*Munoz v. Lopez* (1969) 275 Cal App.2d 178, 181.) "Reasonable time" from date of discovery by analogy to former Code of Civil Procedure section 473a (now § 473.5) is *limited* to one year. (*Estate of Estrem* (1940) 16 Cal.2d 563,

571; *Sullivan v. Sullivan* (1967) 256 CalApp.2d 301, 304; cf. *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1501 [held as a matter of law that one-and one-half year delay in seeking relief after due notice of entry of default is unreasonable].)

" 'In determining whether the delay by the complainant in seeking relief has been unreasonable, many circumstances are to be considered. Although length of time in itself, aside from its likelihood of producing hardship, is not a bar, nevertheless the length of time which has elapsed from the time when the complainant knew or should have known of the facts. . . is an important element where no reason is suggested for the delay.' " (*Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 48.) As more fully discussed below, Fleming knew of the default judgment at least by the time he was evicted in 1976, and evidence strongly suggests that he knew much earlier. The record reflects that Fleming did nothing to set aside the default and default judgment for approximately 10 years. And, as Judge George noted, Fleming offered no evidence of any kind to explain the delay.

We hold as a matter of law that Fleming's motion to vacate the underlying judgment was not brought within a reasonable time of his having actual knowledge of the judgment.

c. *Unclean Hands.*

It is a familiar rule that one who seeks the interposition of a court of equity must come into court with clean hands. (*London v. Marco* (1951) 103 Cal.App.2d 450, 453.) The doctrine is not restricted to cases of actionable fraud. (*McDougall v. O'Hara* (1954)

129 Cal.App.2d 12, 14.) "For it is not only fraud or illegality which will prevent a suitor from obtaining equitable relief. Any unconscientious conduct upon his part which is connected with the controversy will repel him from the form whose very foundation is good conscience. [Citation.]" (*DeGarmo v. Goldman* (1942) 19 Cal.2d 755, 764.) And, "[i]f the *record shows upon its face* that the moving party has failed to act in good faith with the court, that is, has instituted a proceeding or motion with unclean hands, it is the duty of a reviewing court in the interest of justice to determine the propriety of the judgment, decree or order of the trial court." (*Katx v. Karlsson* (1948) 84 Cal.App.2d 469, 473.)

Our investigations have disclosed that an unlawful detainer action brought by Underwood against Fleming in 1975 is integrally related to the issues at bar. The record of that action reveals that Fleming was aware of his rights long ago. We take judicial notice of case number C138890. (Evid.Code, § 452, subd. (d)(2).)

The unlawful detainer file reflects the facts which follow. A judgment in favor of Underwood on his cross-complaint against plaintiff, cross-defendant Morgan and cross-defendant Fleming was entered on March 16, 1971. On July 23, 1974, a writ of execution was issued, directing the sheriff to levy on Fleming's Zorada Drive property. On July 24, the sheriff levied on the property. Statutory notice was given, and the property was sold at public auction to Underwood on September 12. Under Code of Civil Procedure section 700a, Fleming had a one-year period within which to redeem the property by payment of the judgment. No redemption was made or attempted by Fleming or anyone else during that period. On September 17, 1975,

the sheriff executed and delivered to Underwood a sheriff's deed, which was duly recorded. On October 3, Underwood caused to be served a three-day notice to quit and deliver up the premises. A complaint in unlawful detainer was filed October 14. Numerous attempts were made to serve cross-defendant Fleming and plaintiff and cross-defendant Morgan, who apparently were the sole occupants of the Zorada Drive property at this time. Substituted service was eventually effected. On or about November 12, a copy of a request to enter default in the unlawful detainer action was mailed to Fleming and to Morgan. The envelopes were sent back marked "refused," but their condition indicated that they had been opened and resealed. On December 5, default was entered against Fleming and Morgan. Trial was set for January 7, 1976.

Judgment was in favor of Underwood and a writ of execution entitling Underwood to possession was issued on or about January 12. On or about January 22, 1976, Fleming appeared ex parte and obtained a stay of execution pending a motion to vacate. Fleming argued that the underlying judgment on the cross-complaint was void and as a consequence the judgment in unlawful detainer was void as well. His attorney declared that Fleming had "filed a Notice of Motion to Vacate" the underlying judgment. The following grounds for vacation were set forth as part of his attorney's declaration: That on March 25, 1971, Fleming filed a declaration of homestead; on March 12, 1973, he filed a voluntary petition in bankruptcy which resulted in the judgment for approximately $13,000 being discharged and in exemption of the Zorada Drive property; and that because of the misspelling of his name, he had no actual or

constructive notice of the abstract of judgment. Fleming's attorney also declared: "Apparently, from the court files, it appears that my client, Mr. Fleming, who was erroneously sued as a cross-defendant as Edward J. Flemming, aka Mark Roberts, was served on June 24, 1970, almost six years after the date of the original action."

Elsewhere, Fleming stated additional grounds: that the default in the underlying action was entered more than five years from the date the original action had been filed; that "it is this moving party's belief that said judgment is void on its face because of the time gap between issuance of summons and the service of same"; entry of judgment was in excess of five years; and that he had never been personally served or adequately notified in the unlawful detainer action. Fleming requested the court to take judicial notice of the file of the underlying action.

Fleming submitted an "affidavit" that he had never been personally served nor had he avoided service in the unlawful detainer action. Morgan's "affidavit" stated that he had found certain notices on January 14 and had turned them over to an attorney.

Underwood opposed the stay and the motion to vacate on the following grounds: The motion to vacate had been filed without points and authorities in violation of various rules of court and, furthermore, should have been brought in the underlying action; the abstract of judgment in the underlying action had been filed prior to Fleming filing for bankruptcy, and Fleming had not listed Underwood as a secured creditor in his petition; the five year and three year statutes (Code Civ. Proc., §§ 581, subd. (a) and 583) had not been violated because an appeal had tolled the

statutes; that neither Fleming nor Morgan had submitted legally sufficient affidavits and that their statements had not even been signed under penalty of perjury.

Underwood submitted his declaration that when he had accompanied a deputy sheriff to the residence in an attempt to serve Fleming, the person who answered the door identified himself as Royal Moran Hassrick and stated that he was and had been the sole resident of the house for the previous four years. Underwood heard movement within the house during this conversation.

A Mr. Monson, who lived next door to Fleming, declared that the residence had been occupied by two people for six to seven years, but that over the last three to four years, the occupants had refused to answer the door on numerous occasions.

Underwood submitted proof that Fleming had been convicted of mail fraud and use of a fictitious name in mail fraud.

The trial court lifted the stay and denied Fleming's motion without prejudice. Fleming was evicted on January 13, 1976. The files do not indicate that Fleming ever renewed his motion.

None of the above information was disclosed to Judge George, and all that was before the trial court was Fleming's unopposed motion for relief from the 1971 judgment on the cross-complaint. That motion sets forth grounds nearly identical to those on which Fleming relied in 1976. The only important new ground in Fleming's 1985 motion for relief is his assertion for the first time that he was never served in the underlying action. The only evidence he has submitted in support of this argument is his declaration

that he was never served and a statement by Royal M. Hassrick that he and Fleming had been in Colorado together during the time in which personal service was said to have occurred. According to this document, Mr. Hassrick executed his statement at Kolonia Ponape, in the Caroline Islands, a United States Trust Territory. It fails to include the required language "under the laws of the State of California. . . ." (Code of Civ.Proc., § 2015.5)

" 'The burden is on the one coming into a court of equity for relief to prove not only his legal rights but his clean hands, and he may not rely on any deficiencies that may be laid at the door of the [other party]. [Citation.]' " (*Katz v. Karlsson, supra,* 84 Cal. App.2d at p. 475.) The record in this case speaks for itself. It is replete with evidence of a well prepared plan to "work the system." Aware that past witnesses probably would be scattered, that Underwood no longer had any direct interest in the property, that courts are jammed with cases, and that judges must of necessity rely on the good faith of counsel, Fleming moved for relief. He refused to properly notice Underwood until ordered to do so by Judge Newman. As Judge George found below, Fleming and his counsel "knew prior to [the October 9 hearing] that Underwood had transferred title to the property. . .to third parties, but failed to disclose this material fact to the Court at any time prior to May, 1986." Fleming also failed to bring the unlawful detainer action to the attention of Judge George even though it was directly related to the issues before the court. After his motion for relief was granted, Fleming waited more than a month before presenting Judge George with the proposed judgment. The document set forth relief far beyond that granted when the trial court ruled on the

motion to vacate. The judgment was signed December 6, 1985, and was recorded the same day. However, Fleming, in an act akin to lying-in-wait, chose to execute on his judgment four months later during a period when the Levys had begun to move out of the house in preparation for its sale and were on vacation in Mexico.

"The 'clean hands' rule is of ancient origin and given broad application. It is the most important rule affecting the administration of justice. 'Equity denies affirmative relief for such conduct even though it thereby leaves undisturbed and in ostensible full legal effect acts or proceedings which would affirmatively be set aside but for such consideration. [¶] 'The maxim is based on conscience and good faith. It is not strictly or primarily a matter of defense, but is invoked on grounds of public policy and for the protection of the integrity of the court.' [Citation.]" (*Katz v. Karlsson*, supra, 84 Cal App. 2d at p. 474.) Fleming's acts show not only bad faith but contempt for the administration of justice. Public policy and the integrity of the court demand that Fleming be denied all requested relief on the ground that he proceeded with unclean hands, and we so hold.

3. *Sanctions.*

We cannot hold that the appeal was frivolous within the meaning of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, and therefore decline to award sanctions.

4. *Notice to State Bar of Attorney Misconduct.*

Business and Professions Code section 6086.7 provides: "Whenever a reversal of a judgment in a judicial proceeding is based in whole or in part upon misconduct, incompetent representation, or willful misrepresentation by counsel, the court that ordered reversal of the judgment shall cause the matter to be reported to the State Bar for investigation with regard to the appropriateness of initiating disciplinary action against the attorney. The court shall also notify the attorney involved that the matter has been referred to the State Bar of California for investigation." Our reversal of the judgment in the case at bar is based in part on the November 20, 1985 letter by Martin S. Friedlander, one of Fleming's attorneys, to Judge George, which misled the trial court with regard to a material fact: that the property no longer was owned and occupied by Mr. Underwood. Therefore, as mandated by section 6086.7, the matter shall be reported to the State Bar for investigation and Mr. Friedlander shall be duly notified.

DISPOSITION

We reverse the trial court and order that the post-judgment order of June 6, 1986, be vacated, that the judgment of Decemer 6, 1985, be vacated, and that the trial court deny with prejudice the motion for relief filed by Mr. Fleming on June 4, 1985.

In the interests of justice, costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED

LUCAS, P.J.

We concur:
ASHBY, J.
BOREN, J.

[ADDENDUM]

HERZFELD & RUBIN
ATTORNEYS AT LAW
[Illegible]

November 20, 1985

The Honorable Ronald M. George
Judge Presiding, Department 84
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

Re: Underwood vs. Fleming
LASC Case No. 845685
Hearing Date, October 9, 1985

Dear Judge George:

On October 9, 1985, when I appeared in court for the hearing on this Motion, your clerk had not as yet located the file, and at my request, you took Fleming's Motion under submisstion. On that date, I advised you that I was leaving for the Orient on a four week vacation on October 12, 1985, and that in the event you ruled favorably on my Motion, I would want an opportunity to prepare a formal written Order to be signed by you to fully reflect the findings of the court and the court orders with respect thereto. I have prepared for your review and execution, a Court Order which I believe emobodies your findings and orders based upon the Motion presented and the court file in this matter.

I have been quite elaborate in drafting this proposed Court Order for the following reasons. Mr. Fleming

personally resided in the real property located at 2600 Zorada Drive, Los Angeles, California 90046, which real estate is described in the proposed Court Order. The court file and the Motion papers reflect that Charles Underwood enforced the void Judgment by obtaining a Writ of Execution against Mr. Fleming, and levying execution against Mr. Fleming's personal residence. As a result of the Execution sale of Mr. Fleming's residence, at which sale Mr. Underwood was the highest bidder, the Sheriff seized Mr. Fleming's residence, changed the locks, and physically evicted Mr. Fleming, placing Mr. Underwood into possession along with all of the personal property of Mr. Fleming located in Mr. Fleming's residence.

It is therefore very important that Mr. Fleming be awarded restitution of his home and his personal property located therein. For that reason, I have prepared court orders for your review granting Mr. Fleming restitution of his premises, along with the personal property contained therein, quieting title in Mr. Fleming's favor as to the physical premises and the personal property lcoated therein. We are merely placing Mr. Fleming back into possession and title that existed prior to the enforcement of the void Judgment against his real estate and personal property.

I wish to point out to you that I neglected to include as an exhibit to Mr. Fleming's Motion, the Indenture between Peter J. Pitchess, Sheriff of the County of Los Angeles, and Underwood dated September 17, 1975, which document was recorded in the Los Angeles County Recorder's Office on October 10, 1975. You will note that paragraph 10 of the proposed Order deals with this document. Enclosed herewith please find a photocopy of said Indenture bearing the

recording information, and I hereby request that you take judicial notice of the same as being part of the public records of the County of Los Angeles, and include the provisions of paragraph 10 in your Order. I would have included this document as an exhibit to the Judgment, but I have been informed by the Judgment Clerk that judgments are not to have exhibits appended thereto.

In view of the great difficulty your clerk had in locating the file in archives for you to rule on this Motion, I have obtained the file for you out of archives to enable you to review this proposed Order for your execution. If this proposed Order meets with your approval, I would appreciate your executing and having your clerk enter this Order. I also request that you have your clerk issue a certified copy of this Order, and mail the same back to me in the enclosed self-addressed, stamped envelope. I have enclosed three copies of this Order for this purpose. If you have any questions with respect to this proposed Order, please do not hesitate to contact the undersigned.

Respectfully submitted,

HERZFELD & RUBIN

/S/

Martin S. Friedlander

MSF:le
Enclosures
cc: Mr. Edward J. Fleming

RECEIVED
OCT 13 1988
HERZFELD & RUBIN

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 5 DATE: 10/12/88

Hersfeld & Rubin
David Wheeler
1925 Century Park East
Suite 600
Los Angeles, CA. 90067

RE: Morgan, Thomas R.
vs.
Fleming, Edward J.
Levy, Shuki Y. & Deborah Dale
2 V 8022367
Los Angeles NO. C845685

THE COURT:

Petition for rehearing is denied.

APPENDIX B

SUPREME COURT
FILED
NOV 3 01988
Clerk
DEPUTY

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, No. B022367
S007624

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MORGAN, Respondent,

v.

UNDERWOOD, Appellant
FLEMING, Appellant.

Petition for review of appellant Fleming DENIED.

LUCAS

Chief Justice

SUPREME COURT
FILED
NOV 30 1988
Clerk
DEPUTY

ORDER DENYING ALTERNATIVE WRIT

No. S007623

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FLEMING, Petitioner

v.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, Respondent; UNDERWOOD ET AL., Real Parties in Interest.

Petition for writ of mandate DENIED.

Chief Justice

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on February 27, 1989, I served the within *WPetition for Writ of Certiorari to the Court of Appeal of the State of California, Second Apellate District, Division Five* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Charles Underwood
19173 Berclair Lane
Tarzana, CA 91356
(3 Copies)

Carl Grumer
Jeffrey D. Spilman
Cooper, Epstein & Hurewitz
345 No. Maple Drive
Suite 200
Beverly Hills, CA 90210
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 27, 1989, at Los Angeles, California.

Claude A. Lagardere
(Original signed)

OFFICIAL SEAL
SHERRI L BELLOTTI
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 2, 1992